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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 121

IN THE MATTER
of the
Petition of the UNITED STATES OF AMERICA, as owner, and BLACK DIAMOND STEAMSHIP CORP., as bareboat charterer, of the Steamship "NORWALK VICTORY", for exoneration from or limitation of liability.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner
(Petitioner-Appellant below),

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents
(Damage-Claimants-Appellees below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. CRANDALL,
Counsel for the Petitioner,
Black Diamond Steamship Corp.

JUDICIAL PRINTING CO., INC., 80 RICHMOND ST., N. Y.—HANOVER 2-0262 1948

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BLACK DIAMOND STEAMSHIP CORP.,

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ROBERT STEWART & SONS, LTD., *et al.*,

Respondents
(Damage-Claimants-Appellees below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein, Black Diamond Steamship Corp., prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered March 29, 1948 (R. 39), affirming an order of the United States District Court for

the Eastern District of New York, which sustained the exceptions of the respondents to the petition for limitation of liability herein and dismissed the petition (R. 20-22).

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is March 29, 1948 (R. 39). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 17, 1925, 28 U. S. C. A. § 347(a) and under General Rule 38 of this Court § 5, subd. (b).

Statement.

This case arises out of a collision between the American steamer *Norwalk Victory*, of which the United States of America is the owner and the petitioner the bareboat charterer, and the British steamer *Merganser*, in the Schelde River, Belgium, on April 28, 1947. The respondents, owners of cargo on the *Merganser*, which was lost as a result of the collision, sued the petitioner and the United States in the United States District Court for the Eastern District of New York, demanding damages amounting to $1,000,000.

Thereafter the petitioner and the United States, within the six-months statutory period, filed a petition requesting limitation of their liability under the law of Belgium, which is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels. This Convention was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931 (R. 2-13). For brevity, it will be called the Brussels Limitation Convention.

Since the respondents' exceptions perform the function of a demurrer, all well pleaded allegations of fact in the

petition stand as admitted for the purpose of the exceptions. *Suspiro et al. v. Compañia Transatlantica Centro-americana, S. A., et al.*, 37 Fed. Supp. 263, 264 (S. D. N. Y.); *United States Navigation Co., Inc. v. Black Diamond Lines, Inc.*, 37 Fed. Supp. 1005 (S. D. N. Y.). This admission also includes the allegations regarding the law of Belgium, which, of course, is a matter of fact. *Talbot v. Seeman*, 1 Cranch, 1; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; and *Shapleigh v. Mier*, 83 Fed. (2d) 673, 676 (C. C. A. 5).

The facts alleged in the limitation petition, so far as relevant to this petition, are these:

The *Norwalk Victory*, when the collision occurred, was engaged on a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands. She left Antwerp for Rotterdam at ~~7:50~~ P. M., on April 28, 1947, with some 1150 tons of cargo aboard. While proceeding down the Schelde River she collided with the British steamer *Merganser* at 11:45 P. M. near Lille, Belgium. The *Merganser* was sunk and her chief steward was killed.

Shortly afterward British and Continental S. S. Co. Ltd., owner of the *Merganser*, sued the petitioner in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the vessel. In that suit the petitioner was required to post bail in pounds sterling equivalent to $1,000,000.

About six months later the suit on which this petition is based was brought against the petitioner and the United States in this country (Petition, Arts. Fifth and Seventh; R. 3-5, 7; Findings of Fact Nos. 4-9; R. 23, 24).

Article 1 of the Brussels Limitation Convention limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight and accessories with respect to compensation due to third parties because of damage caused by the faults of the master, crew or pilot of the ves-

sel, provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage. Article 4 defines the freight as a lump sum fixed at 10% of the vessel's value at the commencement of the voyage. Article 7 provides for an additional payment of £8. per ton in the case of death or personal injury. Article 10 makes the Convention applicable to an operator or charterer who is liable under Article 1 or Article 7. Article 11 provides for the calculation of tonnage, which is net tonnage plus the amount deducted from the gross tonnage on account of engine room space to ascertain the net tonnage (Petition, Arts. Tenth-Twelfth; R. 8-10; Findings of Fact Nos. 11-17; R. 24, 25).

On the basis of the *Norwalk Victory's* tonnage, calculated as provided in the Convention, plus $100,000, or 10% of her sound value at the commencement of the voyage, the limitation of the petitioner's liability and that of the United States for property damage under the Convention is $325,028.79. The United States, as a corporation sovereign, was of course not required to give a bond. The petitioner, however, posted a surety bond for $325,028.79 (Petition, Art. Thirteenth, R. 10; Findings of Fact Nos. 18-21; R. 25, 26; Bond, R. 15, 16).

Decisions Below.

The District Court's decision is incorporated in its order of dismissal (R. 20-22), to which Conclusions of Law were added (R. 26, 27). The Court dismissed the petition on the authority of *Oceanic Steam Navigation Company, Limited* v. *Mellor* (*The Titanic*), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacão Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). It held that a ship-owner's right to limit its liability in a United States Court is derived exclusively from our limitation of liability statute, 46 U. S. C. A. §§ 181-188, which does not in-

pose a liability but only limits an existing liability, and so does not relate to the substantive right but to the remedy, which is governed by the law of the forum; that it is a jurisdictional requirement under 46 U. S. C. A. § 183, that a sum, or approved security therefor, be deposited with the Court for the benefit of the damage claimants equal to the value of the ship-owner's interest in the vessel and her freight, and that the petitioner had not met this requirement. The Court held, finally, that the fact that the collision took place in Belgian waters did not affect the principles stated (Order, R. 20-22; Conclusions of Law, R. 26, 27). There is no official report of the decision.

The Circuit Court of Appeals, *United States, et al.* v. *Robert Stewart & Sons Limited, et al.*, 167 Fed. (2d) 308 (C. C. A. 2), said that if the petition had alleged that the limitation of liability provided by the Brussels Limitation Convention meant that the limit attached to the right, it would have been conclusive upon the exceptions. Nevertheless it construed the Belgian limitation as one attaching to the right. In spite of this, the Court, as we understand its opinion, sustained the order dismissing the petition on these grounds: First, if the liabilities of the petitioner and the United States are $325,000 under the Belgian law and the *Norwalk Victory* is worth $1,000,000, they had no right to commence this limitation proceeding but are confined to asserting their privilege as a defense to suits against them; second, if, on the other hand, their liabilities exceed $325,000 the bond filed by the petitioner was too small (R. 38).

Questions Presented.

1. In the case of a collision between an American vessel and a British vessel in the waters of Belgium, where a suit for damages based thereon has been brought in a United States Court, is limitation of the ship-owner's

liability, as distinguished from the means employed to secure such limitation, determined by the law of Belgium or that of the United States?

2. Is the limitation of a ship-owner's liability, as distinguished from the modes of procedure used to secure it, a matter of right or a matter of remedy?

3. Is a ship-owner who relies on limitation of liability under a foreign law in a United States Court restricted to pleading the foreign law as a defense in a suit against him or can he also invoke such law by a petition for limitation of liability under R. S. § 4285, 46 U. S. C. A. § 185, wherein a concourse of the claimants can be secured?

4. Is the limitation of a ship-owner's liability provided by the Brussels Limitation Convention a limitation attached to the right?

5. If limitation of the petitioner's liability is determined by the law of Belgium, is it permissible for the petitioner to claim the Belgian limitation in a limitation proceeding filed under R. S. § 4285, and, if so, would not the amount of the petitioner's interest in the vessel and her freight be that fixed by the Belgian law rather than the law of the United States?

6. Is the *Titanic* decision, *supra*, holding that limitation of liability is a limitation on the remedy, which is governed by the law of the forum, correct, and if not, should it not be overruled?

7. Is the decision in *The Titanic* in harmony with this Court's decisions on conflict of laws in *Northern Pacific R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190); *Slater* v. *Mexican National R. R. Co.*, [redacted] U. S. 120; *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473; *American*

Baviana Co. v. *United Fruit Co.*, 213 U. S. 347, and *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542?

8. Is not the *Titanic* case in any event distinguishable from this one on the ground that there the disaster occurred on the high seas, whereas in the present case the collision occurred in foreign territorial waters?

9. Does the *Titanic* decision accord with the rule on conflict of laws applied by this Court in *The Scotland*, 105 U. S. 24; *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355); *Thommessen and another* v. *Whitwill* (*The Great Western*), 6 Sup. Ct. Rep. 1172 (118 U. S. 520) and *La Bourgogne*, 210 U. S. 95, and, if not, should it not be modified to bring it into harmony with those decisions?

Specifications of Error to Be Urged.

The Circuit Court of Appeals Erred:

1. In affirming the order of the District Court dismissing the petition herein for limitation of liability.

2. In failing to hold that this petition was properly filed under R. S. § 4285.

3. In failing to hold that since the collision occurred within the territorial waters of Belgium, the limitation of liability provided by the Brussels Limitation Convention applies.

4. In failing to hold that limitation of a ship-owner's liability is a matter of right which is governed by the *lex loci delicti*.

5. In failing to hold that the limitation of liability provided by the Brussels Limitation Convention is a limita-

tion attaching to the respondents' rights and measures the extent of their recoveries against the petitioner.

6. In failing to hold that the petitioner's interest in the *Norwalk Victory* for the purpose of limitation of liability in the case of property damage is $325,028.79, under the provisions of the Brussels Limitation Convention, and that the posting of a bond for that amount by the petitioner was sufficient compliance with R. S. § 4285.

7. In holding that the decisions in *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.) govern this case.

8. In holding that the question presented by this petition could not arise unless the petitioner were sued at law.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioner is not entitled to invoke the Belgian law as to limitation of liability by a petition for limitation of liability, but is confined to pleading the Belgian law as a defense to the libel of the respondents herein, has decided an important question of federal law which has not been, but should be, settled by this Court.

2. If it be held that limitation of liability is a matter of right and not of remedy, it is important that it be decided whether a ship-owner, sued in a court of the United States for damages arising out of a collision in foreign territorial waters, can claim the limitation of liability provided by the law of the place of the tort by way of petition, or whether it is restricted to pleading the foreign limitation of liability as a defense in its answer to the libel.

3. It is likewise important that it be determined whether the term "interest", used in R. S. § 4285, is to be construed literally in all cases as meaning the value of the shipowner's whole interest in the vessel and her freight, or whether in the case of a tort occurring in a foreign country, such as this one, the term will be construed broadly in favor of the petitioner and be held to mean the owner's interest for purposes of limitation of liability as fixed by the law of such foreign country.

4. The Court below, in failing to hold that the limitation of the petitioner's liability is governed by the law of Belgium, has decided a Federal question in a way which is probably in conflict with applicable decisions of this Court, namely, those cited *supra*, pages 6, 7, in subdivision (7) of the heading "Questions Presented".

5. Although the Court below clearly indicated that in its opinion the *Titanic* decision would not apply if the Belgian limitation attaches to the right, the District Court dismissed the petition on the authority of *The Titanic*. The *Titanic* decision is therefore involved herein and it is necessary, we believe, that this Court determine what bearing, if any, it has on this case.

6. The *Titanic* decision, we submit, should be re-examined with a view to determining whether the statements therein, that limitation of liability is a limitation on the remedy which is governed by the law of the forum, are correct, and reconcilable with this Court's decisions cited *supra*, pages 6, 7, in subdivision (7) under the heading "Questions Presented", and, if not, whether the *Titanic* decision should not be overruled.

7. If the *Titanic* decision is not overruled, it should, we submit, at least be modified to accord with the rule on conflict of laws laid down by this Court in *The Scotland*, *The Belgenland*, *Thommessen and another* v. *Whitwill*, (*The*

Great Western) and *La Bourgogne* (*supra*, p. 7) which involved collisions on the high seas.

8. The Court below, it is believed, erroneously considered this case as falling within the rule stated in *The Aquitania*, *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, and *The George W. Fields* (*supra*, p. 8), wherein the value of the vessels greatly exceeded the total of all known or foreseeable claims, whereas the limitation claimed here is about one-third of the total claims for which the petitioner has been sued in the United States.

9. The questions involved are of great importance, and the case is one of general interest, not only in the United States but in England and the Continent, the disaster at present involving litigation in the Courts of England and the United States, with the probability of additional litigation in Belgium.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, June 22, 1948.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner.

By JOHN W. CRANDALL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioner's first point deals with this Court's decisions on conflict of laws in situations analogous to this one (pp. 11-16). The second point discusses the *Titanic* case and prior decisions of this Court involving collisions on the high seas (pp. 16-20). In the third point it is argued that the petitioner may properly claim the benefit of the Belgian limitation law by petition (pp. 21-23). The fourth and final point (p. 24) emphasizes the general interest in the case and the importance of the questions presented.

POINT I.

The Court below, in holding that the petitioner has not shown itself entitled to file this petition for the limitation of its liability to the amount fixed by the law of Belgium, where the tort occurred, has rendered a decision on a Federal question which is in probable conflict with applicable decisions of this Court.

As has been noted, the Court below said that if the petition had alleged that the limitation provided by the Convention was a limit attached to the right, it would have been conclusive upon exceptions. Nevertheless, without deciding the point, the Court construed the Belgian law as a limitation on the right. That this is so seems perfectly clear from the Convention. Article I (R. 8, 9), says: "The *liability* of the owner of a seagoing vessel is *limited* to an amount equal to the value of the vessel, etc."

(Italics ours.) It is just as if it had said that claimants are limited in their recoveries to the vessel's value, plus freight, as determined by the Convention. If this is a limitation attaching to the right—and it seems manifest that it is—it should be the one which governs under the rule laid down by this Court in similar cases.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), the plaintiff, as administrator, sued in a Federal Court in Minnesota to recover damages for the death of the decedent, Munro, a Northern Pacific engineer. Munro was killed in Montana, which had no limit on the amount recoverable in a death case. In Minnesota, however, the limit of recovery for death when Munro was killed was $5,000, and $10,000 when the case was tried. The jury awarded the plaintiff $10,000. This Court (WHITE, *J.*) held that the right to recover and the amount of damages recoverable were governed by the *lex loci* and not by the *lex fori*.

In *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, suit was brought in the United States Circuit Court in Texas to recover damages for the death in Mexico of the defendant, a switchman on the defendant railroad. Under the Mexican law a decree for damages in a death case was analogous to one for alimony, contemplating periodical payments and being subject to modification from time to time. The Court and jury, however, fixed the recovery in a lump sum under the Texas statute.

This Court (HOLMES, *J.*) said (p. 126):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. * * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the

> existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, *and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.* • • • Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." (Italics ours.)

In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, a telegram was despatched from South Carolina to the plaintiff in Washington, D. C. notifying her of her sister's death. Delivery was negligently delayed in Washington, causing the plaintiff to miss the funeral. She sued in a South Carolina State court under the South Carolina Civil Code, alleging mental anguish and consequent damages. A recovery was allowed under that Code, regardless of the Washington law.

This Court reversed the judgment, Mr. Justice HOLMES saying (pp. 546, 547):

> "Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground *but the measure of the maximum recovery.* • • • (A limitation of liability *may* stand on different grounds, *The Titanic*, 233 U. S. 718). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; • • •" (Italics ours.)

See also: *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, 478, 479; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 355, 356; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99.

In *Mosby* v. *Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8) the plaintiff, owner of a ranch in Kansas, sued the defendants in the federal court in Missouri for damages resulting from a nuisance created and maintained by the oil drilling and producing operations of the defendants. The defendants had been acting independently and not concurrently but could be sued jointly under the law of Kansas although not under the law of Missouri. The trial Judge held that the law of the forum applied and granted the defendants' motion for a directed verdict because of a misjoinder of parties. The Circuit Court of Appeals, however, pointed out that the extent of the liability of each defendant was quite different in the two States. It held that the difference between their laws was more than a procedural one and went to the extent or scope of the causes of action; that it was one of substantive right which was governed by the law of Kansas.

See also: *Lauria* v. *E. I. Du Pont de Nemours & Co., Inc.*, 241 Fed. 687, 693 (E. D. N. Y.).

The Court below has itself followed the same rule. In *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), which involved a collision between the Brazilian steamer *Mandu* and the German steamer *Denderah* in Brazilian waters, it held that the Brussels Collision Convention of 1910, which was in force in Brazil, governed. The suit was brought against the *Mandu* by the underwriters of the cargo on the *Denderah*. Under the American rule, in the event of mutual fault, the cargo would have secured a 100% recovery against the *Mandu*, leaving her with the right of recoupment or set-off against the *Denderah's* owners. However, under the Brussels Collision Convention each vessel is liable to cargo only

in proportion to the fault charged against her. In a later decision on the merits, *The Maudu*, 114 Fed. (2d) 361 (C. C. A. 2), the Court found both vessels at fault, apportioning 4/5ths of the liability to the *Denderah* and 1/5th to the *Maudu*. This, of course, represented an 80% reduction in the amount cargo could have recovered from the *Maudu* under the American rule, which was actually a limitation of the ship's liability and was so recognized by the Court.

In the case at bar the Court expressed the opinion that the *Titanic* decision would not apply if the Belgian limitation attaches to the right (R. 37). Nevertheless it affirmed the District Court's order on the authority of *The Aquitania, Curtis Bay Towing Co.* v. *Tug Kevin Moran*, and *The George W. Fields* (*supra*, p. 8). But in those cases the value of the vessels far exceeded the known or foreseeable claims so that the petitioners showed no grounds whatever for initiating limitation proceedings.

The Court's reasoning, if we understand it correctly, was that if the liabilities of the petitioner and the United States are, say, $325,000, when the *Norwalk Victory's* value was $1,000,000, they had no right to commence this proceeding, whereas, if the liabilities may exceed $325,000, the bond posted is too small. But surely this does not settle the matter. The situation here is the reverse of those in the cases cited. The cargo claims in suit aggregate $1,000,000 (Petition, Art. 7, R. 7) as against a limitation of liability of $325,028.79 provided by the Brussels Convention. If the Belgian law is held applicable the vessel's value would be immaterial since it was not lower than £8. per ton, plus freight, as fixed by the Convention. If limitation were to be determined by our law the bond of $325,028.79 is of course too small. But since the Court seemingly was of the opinion that the Belgian law governs, if its limitation is attached to the right, we do not see how such cases as *The Aquitania* apply at all.

The lower Court, we submit, erred in failing to hold that the Convention places a limitation on the rights of claimants against the vessel, that the Belgian limitation law therefore governs, and that this petition is proper. Because of the extreme importance of the questions presented we believe that they should be reviewed by this Court on certiorari.

POINT II.

The soundness of the *Titanic* decision, it is believed, is extremely doubtful. It is therefore respectfully suggested that it be re-examined and, if not overruled, that it at least be modified to bring it into harmony with the earlier decisions of this Court in similar situations.

We have not assigned error to the lower Court's interpretation of the *Titanic* decision because it was in our favor. But since the District Court dismissed the petition on the authority of *The Titanic* (R. 21), and because the respondents' counsel doubtless will contend that the order should have been affirmed on that ground, a consideration of *The Titanic*, together with certain prior decisions of this Court, is advisable.

The *Titanic* case, it will be recollected, involved a collision between the steamer *Titanic* and an iceberg on the high seas. Before discussing it, however, we shall refer briefly to the Court's previous decisions on the same general subject.

In *The Scotland*, 105 U. S. 24, the British steamer *Scotland* and the American ship *Kate Dyer* collided on the high seas and both were lost. In a suit by the owners of the *Kate Dyer* against the owners of the *Scotland*, the latter, as a defense, claimed limitation of liability both under the general maritime law and the American statutes. This

Court held that the American limitation law applied and that a foreign ship-owner could claim its benefit. Mr. Justice BRADLEY, after stating what law would be applied if the collision had occurred in foreign waters, said (p. 29):

> "But, if a collision occurs on the high seas, where the law of no particular State has exclusive force but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision."

In *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), the Belgian steamer *Belgenland* and the Norwegian bark *Luna* collided on the high seas and the *Luna* was sunk. The *Luna's* owners libelled the *Belgenland* in the Circuit Court in Pennsylvania and exception was taken to the court's jurisdiction. This Court (BRADLEY, *J.*), sustained the court's jurisdiction and said further (p. 867):

> "As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

In *Thommessen and another* v. *Whitwill, (The Great Western)*, 6 Sup. Ct. Rep. 1172 (118 U. S. 520), the British steamer *Great Western* and the Norwegian bark *Daphne* collided on the high seas. The steamer was later stranded and wrecked through careless navigation. In a suit by

the *Daphne's* owners, the owners of the *Great Western* pleaded limitation of their liability under R. S. § 4285. This Court (BRADLEY, *J.*), allowed limitation, saying that the case was properly decided according to the maritime law of the United States, the law of the forum.

In *La Bourgogne*, 210 U. S. 95, the French steamer *La Bourgogne* was sunk in a collision with the British ship *Cromartyshire* off Sable Island. Suits were brought here and the owner of *La Bourgogne* petitioned for limitation of its liability under the United States statutes. This Court (WHITE, *J.*) upheld the petitioner's right to limitation, saying, (p. 116) that the issues were of such a character "as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise."

In *The Titanic*, the White Star Line, owner of the *Titanic*, filed a petition for limitation of its liability under United States law. Two claimants excepted to the petition alleging that it failed to show a cause of action for limitation of liability under our law and on the contrary showed that the disaster involved a British vessel on the high seas and therefore the British limitation law applied.

The District Court, *The Titanic*, 209 Fed. 501 (S. D. N. Y.), sustained the exceptions, basing its decision on the statement of Mr. Justice BRADLEY in *The Scotland*, *supra*, that if a collision should occur on the high seas between vessels of the same nationality the law of their flag would be applied in litigation in the United States. The petition accordingly was dismissed with leave to amend.

The Circuit Court of Appeals, *The Titanic*, 209 Fed. 513 (C. C. A. 2), certified three questions to this Court, which were, in substance: (a) whether the ship-owner could maintain the proceeding under R. S. §§ 4283-4285 and the 54th and 56th Rules in Admiralty, if there was no

evidence as to the foreign limitation law; (b) whether the owner could still maintain the proceeding if it appeared that the foreign law provided a different limitation of liability from that of the United States; and (c), if so, whether our Courts would enforce United States law or the foreign law with respect to the amount of the owner's liability.

This Court (HOLMES, *J.*), answering the certificate, said that since the American statute did not undertake to impose liability, but only to limit an existing one, it was a limitation on the remedy, and so was governed by the law of the forum, and that the petition was maintainable under United States law.

Thus (excluding *The Titanic*) there are the two groups of cases, the first involving torts on the high seas where petitions for limitation of liability by foreign ship-owners were held maintainable under American law on the ground that the maritime law, as practised in this country, furnishes the proper rules of decision, and the second involving torts within a foreign jurisdiction, where the *lex loci delicti* was applied, not only as to liability but its measure, extent, and any limitations thereon. Since the case at bar arose out of a collision in Belgian waters it clearly falls within the second group.

The two lines of decisions appear readily reconcilable on the basis of the *locus* of the tort in question, as between the high seas and the territorial limits of a particular sovereignty. Since the high seas are a region "subject to no sovereign", *American Banana Co.* v. *United Fruit Co., supra*, and the law of no country has exclusive force there, *The Scotland, supra*, it is but natural that the maritime law of this country would be applied in litigation here based on torts committed on the high seas. But where the tort has occurred in a foreign jurisdiction we have an entirely different situation. We believe that Mr.

Justice HOLMES himself doubted that the *Titanic* decision would apply to a foreign tort, as shown by his rather casual reference to *The Titanic* in *Western Union Telegraph Company* v. *Brown*, *supra*.

We do not believe that it was necessary for the Court to construe limitation of liability as a remedy in *The Titanic* in order to uphold the White Star Line's petition. With due deference, it seems to us that to have followed the rationale of the previous decisions, such as *The Scotland* and *La Bourgogne*, would have been sufficient.

To conceive of limitation of liability as a remedy leads to curious results. For example, a ship-owner relying on limitation of liability by way of defense, *The Scotland*, *supra*, *The Chickie*, 141 Fed. (2d) 80, 85 (C. C. A. 3), would be pleading a remedy. So would he too if he pleaded the $500 per package limitation of the Carriage of Goods By Sea Act, 46 U. S. C. A. § 1304(5). But we doubt if it would be seriously contended that defenses such as these would be setting up anything other than statutory rights.

Two cases in the lower courts have been cited as holding that limitation of liability is governed by the law of the forum under *The Titanic*, namely, *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d). 757 (E. D. N. Y.). But the Court's remarks in *The Mandu* were dictum and in the *Royal Mail* case the state of the record was such that the question was not squarely presented.

Since the soundness of the *Titanic* decision seems open to question, and since it will be argued that it governs this case, we respectfully submit that it be re-examined and either overruled or at least qualified or modified to accord with the decisions in *The Scotland* and *La Bourgogne* and the others previously cited (pp. 17, 18).

POINT III.

The dismissal of this limitation petition presents to this Court for the first time the question as to whether a ship-owner, in the case of a collision in the waters of a foreign country, is entitled to file a petition in a United States court asking that its liability be limited to the amount provided by the law of such foreign nation.

The respondents' exceptions were based on the alleged failure of the petitioner and the United States to transfer their interest in the vessel and her freight to a trustee or to deposit with the court a sum equal thereto or approved security therefor under 46 U. S. C. A. § 185 and the Admiralty Rules of this Court (R. 17, 18). The District Court sustained the exceptions partly for this reason (Order, R. 27; Conclusion of Law, No. 5, R. 27). The United States, however, was not required to post a bond.

The lower Court, although apparently considering the Belgian law to be applicable if its limitation attaches to the right, held, for reasons that are not clear to us, that the petitioner could not invoke that law by petition but could raise it as a defense. The petitioner has in fact pleaded the Belgian limitation law as a defense in its answer to the respondents' libel. But the difficulty is that a concourse of claimants cannot be secured by a defense as it can be by petition.

The Court below also said that the questions raised by the petition could only arise if the petitioner were sued at law, citing *Ex Parte Green*, 286 U. S. 437. We do not see the applicability of the *Green* case. There Green sued Langnes, the owner of the vessel *Aloha*, in the Superior Court of Washington. Langnes then filed a petition

for limitation of liability in the federal court. This Court, in *Langnes* v. *Green*, 282 U. S. 531, had held that the district court should have permitted the action to proceed in the State court, retaining the limitation petition for future action, if necessary. Later Green made an issue in the State court as to the right of Langnes to limitation and this Court, in *Ex Parte Green*, held that if Green pressed the issue it was cognizable only in admiralty, but if he withdrew it the case could remain in the State court. Surely no such situation exists here. The present question is whether the petitioner, aside from having the right to plead the Belgian limitation law as a defense, may rely upon that law by a petition for limitation. We submit that it can.

Article 1 of the Brussels Limitation Convention starts out by limiting the ship-owner's liability to the value of the vessel and her freight (Petition, Art. Twelfth, R. 8, 9), just as our statute does. But the Article contains a proviso which places a limit of £8. per ton on value and, Article 4 defines freight as a lump sum equal to 10% of the vessel's sound value at the beginning of the voyage.

It might be argued that the word "interest" in our statute, construed literally, means the petitioner's entire interest in the vessel and her freight. But if it is held that limitation of liability is governed by the law of Belgium the petitioner's interest for limitation purposes should be $325,028.79, as fixed by the Convention, and a bond for that sum was posted by the petitioner.

We do not see that it does any violence to R. S. § 4285 to take the petitioner's interest in the ship and her freight at the figure arrived at under the Convention's provisions. To do so would simply be to follow the consistent policy adopted by the courts of construing the statute liberally in favor of ship-owners.

In *Coryell* v. *Phipps*, 317 U. S. 406, this Court, referring to the construction of the statute with respect to privity, said (p. 411):

> "That' construction stems from the 'well settled policy to administer the statute not 'with a tight and grudging hand' (Mr. Justice Bradley in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589), but 'broadly and liberally' so as 'to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.' *Just* v. *Chambers*, 312 U. S. 383, 385."

See also, *Larsen* v. *Northland Trans. Co.*, 292 U. S. 20, 24.

In *The Scotland*, *supra*, where limitation of liability was pleaded as a defense, objection was made that the ship-owners did not follow the statute by giving up and conveying to a trustee the strippings of the wreck and the pending freight. The Court said (p. 34) that this was not necessary; that where all the parties injured appeared as libellants or intervenors, an answer setting up such a defense gave the ship-owners all the protection they needed; and that it was sufficient to enter a decree against them for the amount of their limited liability and to distribute the sum among the parties entitled to it.

This question now comes before this Court for the first time and because of its far-reaching importance, we respectfully submit that it should be reviewed on certiorari and decided.

POINT IV.

The questions presented are of extreme importance and of unusual interest, not only in the United States but abroad.

The litigation arising out of this collision now embraces two countries, England and the United States, and soon a third country, Belgium, will be involved, as the Belgian Government, we understand, expects to press its claims for the cost of raising the *Merganser* and for damage to the bank of the Schelde River. Therefore, what happens in this case will have repercussions extending to England and the Continent.

The interesting questions of conflict of laws presented, and the questions relating to R. S. §§ 4283 and 4285, and, above all, the questions relating to the *Titanic* decision, make this an unusually meritorious case for the issuance of a writ of certiorari.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, June 22, 1948.

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